No. 84-326

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AUG 27 1984
ALEXANDER L. STEVA
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In The

Supreme Court of the United States

October Term, 1984

JOHN T. CAIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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23pp

QUESTION PRESENTED

Does New York State's classification excluding criminal defendants from an equal right of appeal to the State's highest court in cases directly involving substantial constitutional questions, under Article VI, Section 3, of the New York State Constitution, bear any reasonable relationship or relevance to the perceived purposes of affording protection of constitutional rights at the highest level of the State's judicial system?

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No.

In The

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October Term, 1984

JOHN T. CAIN,

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

OPINIONS BELOW

No opinions were rendered in the courts below pertaining to the issue on this appeal. The certificate denying leave of the Hon. Bernard S. Meyer, denying permission to appeal to the Court of Appeals of the State of New York, dated May 29, 1984, is annexed as Appendix A. The order without opinion of the Appellate Division, Second Department, is annexed as Appendix B. Defendant was convicted after a jury trial and sentenced without opinion.

JURISDICTION

The certificate denying leave pursuant to Section 460.20 of the Criminal Procedure Law of New York was entered on May 29, 1984. A notice of appeal was filed in the County Court of Nassau County on August 10, 1984 and is annexed as Appendix C.

The jurisdiction of this Court rests on 28 U.S.C. §1257(2) and §2101(d). Rule 11.1 of the Rules of this Court provide that an appeal to review the judgment of a state court in a criminal case shall be in time when the appeal is taken within 90 days after the entry of such judgment and the case is timely docketed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. VI, Section 3 of the New York State Constitution is annexed hereto as Appendix E.

STATEMENT OF THE CASE

Appellant is a tenured public school teacher in New York City without prior criminal record who resides in the Town of Oyster Bay, Nassau County, New York. He has been free on conditional discharge granted at sentence and upon stays of the judgment of conviction granted by the Hon. Leon D. Lazer of the Appellate Division, Second Department, and the Honorable Bernard S. Meyer of the New York State Court of Appeals.

Counsel for appellant has represented to the Nassau County District Attorney that he will apply for a stay in this Court.

The judgment of conviction was rendered in the County Court of Nassau County by the Hon. Patrick J. Cunningham on May 26, 1982. It was based upon the verdict of a jury after trial held on March 8, 9, 10, 11 and 12, 1982.

The jury found defendant guilty of *intentional* misconduct in relation to designating petitions for the Republican primary in 1980, under the Election Law of New York, Sec. 17-122(7) and *intentionally* making a punishable false written statement, under the Penal Law of New York, Sec. 210.45, as part of the same transaction or series of transactions.

The sentence imposed consisted of a conditional discharge on each count and a fine of $1,000 and 500 hours of community service for the Penal Law offense and $500 and 200 hours of community service for the Election Law offense, to be served consecutively.

The Appellate Division, Second Department, modified the judgment of conviction by reducing the community service condition on the Penal Law count to 200 hours and providing that the community service conditions be served concurrently. The judgment of conviction was otherwise unanimously affirmed without opinion.

Appellant pursued the only method of appeal to the New York State Court of Appeals available to a criminal defendant, a criminal leave application to a single judge of the Court of Appeals pursuant to Sec. 460.20 of the Criminal Procedure Law of New York. The application was assigned to the Hon. Bernard S. Meyer, associate judge of the New York State Court of Appeals

on or about February 27, 1984. On May 29, 1984, Judge Meyer denied the application.

In the proceedings before Judge Meyer, appellant challenged the constitutionality of Artice VI, Sec. 3 of the New York State Constitution on the ground that it accords criminal defendants a less favorable method of appealing state and federal constitutional questions to the highest court of the state than it does to the parties to civil cases. Appellant stated in his challenge:

> There appears to be utterly no rational basis or the furtherance of any legitmate state interest in this facial distinction between criminal and civil cases. See *Griffin v. Illinois*, 351 U.S. 12; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422.

THE FEDERAL QUESTION IS SUBSTANTIAL

Criminal defendants nationwide share the status of being a disfavored group in American society. This is so even before they have been convicted, despite the presumption of innocence.

Convicted criminal defendants whose judgments of conviction are pending appeal are treated as a disfavored group on the face of the New York State Constitution. *See* Art. VI, Sec. 3, annexed hereto as Appendix E.

The New York State Constitution makes special provision for an appeal as of right to the State's highest court, the Court of Appeals, whenever there is directly involved a substantial question arising under the Constitution of the State of New York or of the United States. *See* subdv. [b][1] of Art. VI, Sec. 3, reproduced in Appendix E.

For reasons which are not apparent, this provision for a right of appeal to the State's highest court in constitutional cases is restricted to civil cases. In criminal cases, the State Legislature is given discretion to provide in noncapital cases for no appeal to the State's highest court or for review less favorable than in civil cases. *See* Art. VI, Sec. 3, *supra*.

The current, exclusive method of review of noncapital criminal cases with substantial constitutional questions directly involved provided by the State Legislature, is Sec. 460.20 of the Criminal Procedure Law of New York. It consists of seeking permission to appeal to the New York State Court of Appeals from a single judge of that court. Thus, criminal cases identical to the civil cases given an appeal of right to that court are expressly treated as a disfavored group.

The goal or purpose sought to be achieved by the framers of the New York State Constitution was protection of constitutional rights at the highest level of the State's judicial system. However, no reason is apparent why the constitutional right of criminal defendants should not be given equal protection. To assert that cases of a criminal nature are less worthy of protection is to engage in a presumption that convicted criminal defendants have meritless appeals.

Undoubtedly, the cost of affording criminal defendants an equal right to appeal to the State's highest court in constitutional cases would be significant. Few criminal cases do not involve one or more substantial constitutional questions. But cost is not the issue.

The issue is whether the classification of civil and criminal cases challenged here bears any reasonable relation or relevance to the perceived purpose of affording a right to protection in the State's highest court of one's constitutional rights.

It is respectfully submitted that it does not meet even the minimal standards of equal protection analysis by this Court in *Griffin v. Illinois,* 351 U.S. 12; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422. These were the cases cited by the appellant before the Hon. Bernard S. Meyer as part of appellant's criminal leave application pursuant to Sec. 460.20 of the Criminal Procedure Law of New York, *see* Appendix D.

Among other substantial constitutional questions preserved by appellant in the courts below was that of prosecutorial misconduct during the Grand Jury proceedings under the decisions of this Court in *United States v. Washington,* 431 U.S. 181, 190, note 6; *Brady v. Maryland,* 373 U.S. 83 and *United States v. Agurs,* 427 U.S. 97. *See* the order of Mr. Justice Marshall denying a stay of further proceedings of Indictment 52265 (the indictment in the case at bar) in *Cain v. County Court of Nassau County,* in May, 1982.

These issues are substantial in view of the less favorable treatment given by the law to disfavored groups in society, an equal protection problem repeatedly addressed by this Court in the cases involving illegitimate children. *See Pickett v. Brown,* ____ U.S. ____, 103 S. Ct. 2199 (1983).

CONCLUSION

The issues presented by this appeal are substantial and merit plenary consideration by this Court.

Probable jurisdiction should be noted.

Dated: New York, N.Y.
August 24, 1984

Respectfully submitted,

A. LAWRENCE WASHBURN, JR.
Attorney for Appellant

APPENDIX A — CERTIFICATE DENYING LEAVE DATED MAY 29, 1984

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER, Associate Judge

No. 1282

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOHN T. CAIN,

Appellant.

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which

---

* Description of Order: Order of the Appellate Division, Second Department, entered December 27, 1983, modifying a judgment of conviction of the County Court of the County of Nassau, rendered May 26, 1982, convicting defendant of making a punishable false written statement (Penal Law, §210.45) and misconduct in relation to commissions (Election Law, §17-122, subd 7), after a jury trial, and sentencing him to a conditional discharge on each count and a fine of $1,000 and 500 hours of community service and a fine of $500 and 200 hours of community service, respectively, the conditions as to community service to be served consecutively. The modification consisted of reducing the community service condition on the Penal Law count to 200 hours and providing that the community service conditions be served concurrently. The court otherwise affirmed.

ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
May 29, 1984

s/ Bernard S. Meyer
Associate Judge

APPENDIX B — ORDER WITHOUT OPINION DATED DECEMBER 27, 1983

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 27, 1983

HON. GUY J. MANGANO, Justice Presiding,
HON. FRANK D. O'CONNOR,
HON. MOSES M. WEINSTEIN,
HON. RICHARD A. BROWN.
Associate Justices

The People, etc.,

Respondent,

-v-

John T. Cain,

Appellant.

In the above entitled action, the above named John T. Cain, defendant in this action, having appealed to this court from a judgment of the County Court, Nassau County, rendered May 26, 1982, convicting him of making a punishable false written statement (Penal Law, § 210.45), and misconduct in relation to commissions (Elections Law, § 17-122, subd 7), after a jury trial, and sentencing him to a conditional discharge on each count, and a fine of $1,000 and 500 hours of community service and a fine of $500 and 200 hours of community service, respectively, the conditions as to community service to be served consecutively; and the said appeal having been argued by A. Lawrence Washburn, Jr., Esq., of counsel for appellant and argued by Bruce E. Whitney, Esq., of counsel for respondent, and due deliberation

Appendix B

having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby modified, as a matter of discretion in the interest of justice, by reducing so much of the sentence on defendant's conviction for making a punishable false written statement as imposed 500 hours of community service as a condition of defendant's discharge on that count to a period of 200 hours of community service, and by providing that the conditions of community service imposed on both counts shall run concurrently, and, as so modified, said judgment unanimously affirmed, and the case is hereby remitted to the County Court, Nassau County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:

s/ Irving N. Silkin
Clerk of the Appellate Division

APPENDIX C — NOTICE OF APPEAL DATED AUGUST 10, 1984

Indictment No. 52265

COUNTY COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN T. CAIN,

Defendant.

Notice is hereby given that JOHN T. CAIN, the Defendant above-named, hereby appeals to the Supreme Court of the United States from the final order of the HON. BERNARD S. MEYER, Associated Judge of the Court of Appeals of the State of New York, dated May 29, 1984, which denied permission to appeal to the Court of Appeals from the order of the Appellate Division, Second Department, entered December 27, 1983, modifying a judgment of conviction of the County Court of Nassau County, rendered May 26, 1982.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Dated: Williston Park, N.Y.
August 10, 1984

Appendix C

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Received by Nassau County, County Court
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APPENDIX D — CRIMINAL LEAVE APPLICATION

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April 6, 1984

Hon. Bernard S. Meyer
Chambers
36 W. 44th Street
New York, N.Y. 10036

Attn.: Howard Comet, Esq.

Re: *People v. John T. Cain*

Dear Judge Meyer:

Proceedings in support of the Criminal Leave Application will be handled from this office.

Appendix D

* * *

For the first time on this Criminal Leave Application, Defendant-Appellant, JOHN T. CAIN, challenges Art. 6, Sec. 3 of the New York State Constitution insofar as it fails to extend the *right* of appeal to criminal cases while preserving such right in civil cases "wherein is directly involved the construction of the constitution of the state or of the United States. . . ." There appears to be utterly no rational basis or the furtherance of any legitimate state interest in this facial distinction between criminal and civil cases. See *Griffin v. Illinois,* 351 U.S. 12; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422. It is respectfully submitted that prior to this Criminal Leave Application Defendant-Appellant did not have standing to raise this issue. Defendant-Appellant respectfully requests that the Court set a briefing schedule for the parties since this issue has not previously been briefed.

* * *

If there are any questions with respect to any of the above matters, please do not hesitate to call myself or Mr. Nolan of this office at your convenience.

Respectfully submitted,

s/ A. Lawrence Washburn, Jr.

cc: Bruce E. Whitney, Esq.
Asst. District Attorney
Appeals Bureau, Nassau County

APPENDIX E — ARTICLE VI, SECTION 3 OF THE NEW YORK STATE CONSTITUTION

§3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or

more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

* * *

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ALEXANDER L. STEVAS,
CLERK

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In The

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October Term, 1984

JOHN T. CAIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Does Article VI, Section 3 of the New York State Constitution, which allows an appeal as of right to the State's highest court in a civil case directly involving a constitutional question, but requires a criminal defendant to obtain permission to appeal to that court, deprive appellant of his Fourteenth Amendment right to equal protection?

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No. 84-326

In The

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October Term, 1984

JOHN T. CAIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

On March 12, 1982, appellant John T. Cain was convicted by a jury of making a punishable false written statement [New York Penal Law §210.45 (McKinney's Consolidated Laws of New York, Book 39, 1975)] and misconduct in relation to petitions [New York Election Law §17-122(7) (McKinney's, Book 17, 1978)]. The jury was unable to reach a verdict on a third charge, perjury in the first degree [New York Penal Law §210.15 (McKinney's,

Book 39, 1975)], and as to that charge a mistrial was declared. Cain's convictions stemmed from his misconduct in the 1980 Nassau County Republican primary, when he knowingly permitted registered voters to sign names other than their own on an election petition and then falsely certified that each signer had, in fact, separately appeared before him and personally signed his or her name.

Cain was sentenced on May 26, 1982. For each conviction he received a one-year conditional discharge; in addition, for the crime of making a punishable false written statement, Cain was fined $1,000 and ordered to do five-hundred hours of community service; for the crime of misconduct in relation to petitions, Cain was fined $500 and ordered to do two-hundred hours of community service; the hours of community service were to be done consecutive to each other. At the time of sentence, the perjury charge was dismissed by the court, on motion of the State (appellee) and with Cain's consent, with the proviso that if Cain's convictions on the other two charges were overturned on appeal, the perjury charge would be reinstated.

Cain then exercised his right to appeal [New York Crim. Proc. L. §§450.10(1), 450.60(2) (McKinney's, Book 11A, 1983)], and his appeal was heard by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.[1] On December 27, 1983, the state intermediate appellate court modified the judgment of conviction by reducing the community service condition on the Penal Law count to 200 hours and providing that the community service conditions be served concurrently. *People v. Cain,* 98 A.D. 2d 803 (2d Dept. 1983).

---

1. In New York, an appeal from a judgment of conviction entered in the County Court of Nassau County may be taken as of right to this intermediate appellate court.

Cain then sought leave to appeal to the New York Court of Appeals, the state's highest court, pursuant to New York Crim. Proc. L. §§450.90(1), 460.20 which requires that such permission be granted. Appellant's criminal leave application was assigned to the Hon. Bernard S. Meyer, associate judge of the New York State Court of Appeals. On May 29, 1984, Judge Meyer denied the application.

In the proceedings before Judge Meyer, Cain sought leave to appeal on nearly all the issues he raised in the state intermediate appellate court. Several of the issues Cain sought to appeal to the state's highest tribunal involved federal constitutional claims. In addition, Cain "challenge[d] the constitutionality of Art. 6, Sec. 3 of the New York State Constitution insofar as it fails to extend the *right* of appeal to criminal cases while preserving such right in civil cases 'wherein is directly involved the construction of the constitution of the state or of the United States,' " on the ground that "[t]here appears to be utterly no rational basis or the furtherance of any legitimate state interest in this facial distinction between criminal and civil cases." Appellant's Appendix D, 8a. (Emphasis in the original.)

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution is reproduced in pertinent part in appellant's Jurisdictional Statement, p. 2.

Article VI, Section 3 of the New York State Constitution is annexed to Appellant's Appendix as Appendix E, pp. 9a-10a.

New York Criminal Procedure Law §450.90 and New York Criminal Procedure Law §460.20 are annexed hereto as Appendix A and Appendix B, respectively.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT

Cain challenges New York State's constitutional and statutory scheme, which permits civil litigants to appeal as of right to the New York Court of Appeals from a judgment or order of an intermediate state appellate court which finally determines an action or special proceeding, wherein the construction of the state or federal constitution is directly involved, while requiring criminal defendants to seek leave to appeal to that court, even when state or federal constitutional questions are involved, as violating the Fourteenth Amendment guarantee of equal protection.[2] His claim is frivolous; hence his appeal should be dismissed.

As often stated by this Court, there is no federal constitutional requirement that states provide any right whatsoever to appellate review of criminal convictions. *E.g., Estelle v. Dorrough,* 420 U.S. 534, 536-537 (1975); *Ross v. Moffitt,* 417 U.S. 600, 611 (1974); *Griffin v. Illinois,* 351 U.S. 12, 18 (1955); *McKane v. Durston,* 153 U.S. 684, 687 (1894). Nevertheless, once the state grants the right to appeal, it must meet the requirements of due process and equal protection. *Rinaldi v. Yeager,* 384 U.S. 305, 307 (1966); *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. at 18. With regard to the requirement that there be equal protection, this Court in *Rinaldi* stated:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional

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2. Parenthetically, there is a direct appeal as of right to the Court of Appeals in criminal cases where a sentence of death is involved. New York Crim. Proc. L. §450.70.

> demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same". . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."

384 U.S. at 308-309. (Citations omitted).

In the instant case, it is clear beyond doubt that there is a rational basis for treating civil and criminal litigants, who raise federal and state constitutional issues, differently on appeal. Obviously, in almost every criminal case the issues can readily be framed to present federal constitutional issues. Thus, the Legislature's decision to deny criminal defendants an automatic appeal to the highest state court in order to cut back on the potentially immense number of appellants is alone sufficient to pass the rational basis test.[3]

---

3. The reasonableness of the legislature's decision is borne out by the statistics that appear in the 1981 and 1983 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeal. The 1981 Annual Report, which includes statistics dating back to 1973, reveals that during that eight-year period (1973-1981) the 7-judge tribunal entertained over 11,390 criminal leave applications (CLA). The 1983 Annual Report indicates that for that calendar year 1954 criminal leave applications were received, of which 96 were granted.

On the other hand, the 1981 Annual Report demonstrates that the Court of Appeals from 1976-1981 heard a total of 126 appeals by civil litigants who appealed as a matter of right because the appeal contained a constitutional question. The 126 appeals represented less than 5% of the total number of civil appeals heard by the court during that period of time. The 1983 Annual Report indicates that 14 of the 555 civil appeals heard by the court in 1983 were appeals of right because they contained a constitutional question.

CONCLUSION

Appellant's appeal should be dismissed or affirmed.

Dated: New York, New York
October 18, 1984

Respectfully submitted,

DENIS DILLON
District Attorney, Nassau County
Attorney for Appelllee

ANTHONY J. GIRESE
BRUCE E. WHITNEY
Assistant District Attorneys
Of Counsel

APPENDIX A — NEW YORK CRIMINAL PROCEDURE LAW §450.90. APPEAL TO COURT OF APPEALS FROM ORDER OF INTERMEDIATE APPELLATE COURT; IN WHAT CASES AUTHORIZED

1. Provided that a certificate granting leave to appeal is issued pursuant to section 460.20, an appeal may, except as provided in subdivision two, be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 450.10, 450.15, or 450.20. An order of an intermediate appellate court is adverse to the party who was the appellant in such court when it affirms the judgment, sentence or order appealed from, and is adverse to the party who was the respondent in such court when it reverses the judgment, sentence or order appealed from. An appellate Court order which modifies a judgment or order appealed from is partially adverse to each party.

2. An appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying a judgment, sentence or order of a criminal court may be taken only if:

(a) The court of appeals determines that the intermediate appellate court's determination of reversal or modification was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification; or

(b) The appeal is based upon a contention that corrective action, as that term is defined in section 470.10, taken or directed by the intermediate appellate court was illegal.

APPENDIX B — NEW YORK CRIMINAL PROCEDURE LAW §460.20. CERTIFICATE GRANTING LEAVE TO APPEAL TO COURT OF APPEALS

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order of a judge granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the following judges in the indicated situations:

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by a judge of the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

(b) An application seeking such a certificate from a judge of the court of appeals must be made to the chief judge of such court by submission thereof, either in writing or first orally and then in writing, to the clerk of the court of appeals. The chief judge must then designate a judge of such court to determine the application. The clerk must then notify the respondent of the application and must inform both parties of such designation.

Appendix B

4. A justice of the appellate division to whom such an application has been made, or a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every judge or justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.